IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.3950 OF 2005

IN

SUIT NO.3376 OF 2005

...

SAHARA INDIA COMMERCIAL
CORPORATION LTD. ...PLAINTIFF

V/S.

B. JEEJEEBHOY VAKHARIA
& ASSOCIATES & ORS. ...DEFENDANTS

...

Mr.V.A.Bobde, Sr.Counsel with Mr.N.G.Thakkar, Sr.Counsel, Mr.P.K.Dhakephalkar, Sr.Counsel, Mr.Navneet Shah, Mr.Markand Gandhi, Mr.Gaurav Joshi, Mr.Satyen Vora and Ms.Kamini Verma i/b Markand Gandhi & Co. for the Plaintiff.

Mr.P.K.Samdhani with Mr.Mohd.Akram i/b Harilal Thakkar & Co. for Defendants Nos. 1 to 3.
Mr.Navin Parekh i/b Vivek Kantawala & Co. for Defendant No.4.
Mr.A.Y.Bookwala with Mr.K.P.Jain i/b Tushar Goradia for Defendants Nos. 7 & 11.

...

CORAM: D.K.DESHMUKH, J.

DATED: 4th June, 2007

JUDGMENT:

1. This Notice of Motion is taken out by the Plaintiff. In the suit the Plaintiff is seeking a decree of specific performance of the Memorandum of Understanding (MOU) dated 22-12-2001 as also of the approved draft agreement, supplemental draft agreement and 3 approved draft declarations and other ancillary reliefs.

2. In this Notice of Motion, the Plaintiff is claiming an order of temporary injunction for protecting the possession of the suit property of the Plaintiff, but it was admitted before me by the Plaintiff that presently the Plaintiff is not in possession of the land, therefore, there is no question of granting any temporary injunction protecting Plaintiff's possession of the suit property. The Plaintiff is also claiming a temporary injunction restraining the Defendant No.1 by itself and or through other Defendants from dealing with, disposing of, alienating, or encumbering the suit property during the pendency of the suit. The Plaintiff is a company incorporated under the Companies Act. The Defendant No.1 is a partnership firm of which Defendants Nos. 5 to 10 are the partners. Defendants Nos. 5 to 10 are companies incorporated under the Companies Act. According to allegations in the plaint, Defendant No.2 and Defendant No.3 i.e. Madhu Vakharia and Byramjee N. Jeejeebhoy together alongwith their relatives and nominees control the Defendant No.4 which is a Co.operative Housing Society, Defendants Nos.5 to 10 are companies and are partners of the Defendant No.1 as well as Defendant No.11, which is the company

incorporated under the Companies Act. According to plaint allegation, the Defendant No.4 Co.operative Housing Society is controlled by Defendants Nos. 2 & 3, their family members and nominees. It is claimed that it has 302 members of which 289 are companies incorporated under the Companies Act and those companies have been floated and incorporated at the instance of the Defendants Nos. 2 & 3. The share holders of the said 289 companies are Defendants Nos. 2 & 3, members of their family and their associates. It is also claimed that out of these 289 companies, share holdings of Defendants Nos. 2 & 3 and their associates in 177 companies have been transferred in favour of the Plaintiff.

3. The suit property is land admeasuring approximately 500 acres, which is described at Exh.A to the plaint. According to plaint allegations, the suit land forms a part of land admeasuring 614 acres, out of which 129 acres is creek. This land is situated at Goregaon (West) at village Pahadi. According to the Plaintiff, the suit land was owned by the company by name M/s.B. Jeejeebhoy Pvt.Ltd. The entire land falls within No Development Zone. By Deed of Conveyance dated 21st May, 1985, Byramjee

Jeejeebhoy Pvt.Ltd. transferred the land in favour of the company by name M/s.Pahadi Goregaon Land Development Pvt.Ltd. The said Pahadi Goregaon Land Development Pvt.Ltd. on 17th May, 1988 entered into an agreement agreeing to sell the said and to one M/s.Usha Development Co.operative Housing Society. By Conveyance dated 28-7-1988, M/s.Pahadi Goregaon Land Development Pvt.Ltd. conveyed the land to M/s.Usha Development Co.operative Society Ltd. By an agreement dated 12-7-1988, the said Usha Development Co.operative Housing Society entered into the development agreement with Defendants Nos. 5 to 10 companies. The said Defendants Nos. 5 to 10 who had entered into Development Agreement with Usha Development Co.operative Housing Society, formed a partnership firm i.e. Defendant No.1. Thus the Defendant No.1 got control of the development rights in relation to the land. M/s.Usha Development Co.operative Housing Society under the orders passed by the Asst.Registrar of the Co.operative Societies was divided into four co.operative societies in the year 1991. The four co.operative societies into which Usha Development Co.operative Housing Society was divided in the year 2001 merged into one society, as a result the Defendant No.4 Usha Madhu Development

Co.op. Hsg.Society Ltd. was formed and it became owner of the land.

4. In the year 1991, Pahadi Goregaon Land Development Ltd. went into voluntary winding up and under the voluntary winding up scheme, it was agreed that the benefits of the development agreement which was entered into by Pahadi Goregaon Land Development Pvt.Ltd. with partners of Defendant No.1 was to go to Defendants Nos. 7 and 11, who were share holders of Pahadi Goregaon Land Development Pvt.ltd. In November, 2000, Civil Suit No.4925 of 2000 was filed by Defendants Nos. 7 & 11 for a money decree against the owner of the land.

5. The MOU which is the subject matter of the suit was entered into on 22-13-2001. The position in relation to ownership of the land on that date was as under:-

. The land was owned by Defendant No.4-co.operative Housing Society; The development rights of the land were held by Defendant No.1; Civil Suit No.4925 of 2000 filed by Defendants Nos.7 & 11, share holders of Pahadi Goregaon Land Development Pvt.Ltd. for a

money decree was pending in this court.

6. The suit land falls in No Development Zone. It is common ground that under Development Control Regulations for Gr.Mumbai a residential building is permissible in No Development Zone with FSI of 0.05 in respect of the land upto 1 Hector and thereafter at not more than 0.025 FSI for remaining area of the plot. Under the Regulation 61 of the Development Control Regulations of Gr.Mumbai, the land identified by the Tourism Development Department of Government of Maharashtra and specified by the Government from time to time as suitable for promotion of tourism is to be included in Tourism Development Zone (TDZ). If such land is situated in No Development Zone, then, the land is permitted to be developed for the purpose mentioned in the Regulation 61 with FSI of 0.05. According to plaint allegation, in relation to the land which is in No Development Zone and Tourism Development Zone, Golf Course and Club house are permitted to be established by utilising the permissible FSI.

7. It is in this background that the MOU dated 22-12-2001 was entered into. Clause 25 of this MOU

recites that the MOU is entered into on the basis that Defendant No.1 includes and means Co.operative societies and companies and individuals whose names are mentioned in Clause 25. It is important to note at this juncture that the name of defendant No.4 Co.operative society and the names of Defendants Nos. 7 & 11 are mentioned as also the names of Defendant No.3 and Defendant No.2 are also mentioned. By that MOU, it was agreed that the Plaintiff and B. Jeejeebhoy will develop the entire land in joint venture with the understanding that SAHARA will source the money required for the development of the project including cost of construction of all residential units, club house and golf course and B.Jeejeebhoy will provide entire land with necessary permissions and clearance require for entire development. The agreement recites that the total FSI available for residential is 10.15 lakh sq.ft. and FSI of 6.53 lakh sq.ft. in respect of TDZ. Under the MOU, the Plaintiff was to pay to the Defendant No.1 a sum of Rs.25 crores. The sum of Rs.10 crores was paid on the execution of the MOU. The property after development was to be shared amongst the Plaintiff and the Defendant No.1 as per the terms of the agreement. The agreement was signed

by Defendant No.3 on behalf of the Defendant No.1. Defendant No.2 signed the agreement as a witness. According to the Plaintiff, all responsibilities as regards matters relating to Jeejeeboy in the same MOU were to be the responsibilities by the persons mentioned in Clause 25 thereof. It appears from the plaint allegations that under the MOU the Plaintiff was to develop a golf course on the land. Some residential units with surrounding land were proposed to be constructed and a club house for the golf course was to be constructed consuming whatever FSI is available under the Development Regulations. According to the Plaintiff, an irrevocable licence was created in favour of the Plaintiff to enter the land and to carry out the development work. According to the Plaintiff, under the agreement the Plaintiff undertook various steps to develop the land and spent more than Rs.11 crores. According to the Plaintiff, on 1-8-2002 a sum of Rs.5 crores was paid to the Defendant No.1 by the Plaintiff under the agreement. A notice was received on 30th August, 2002 from the Bombay Municipal Corporation asking stoppage of work. The Department of Ministry of Environment and Forest, Government of India also issued orders , which resulted in stoppage of the

development work. Therefore, the Defendant No.4 filed a Writ Petition in this court being Writ Petition No.1470 of 2003 challenging the orders passed by the Ministry of Environment & Forest. According to the Plaintiff, though the litigation was filed in the name of Defendant No.4, it was funded by the Plaintiff. According to the Plaintiff, the Plaintiff took steps for acquiring share holding in 177 companies which are members of the Defendant No.4 co.operative society in accordance with agreement. The Plaintiff also prepared formal agreement containing legal terms. According to plaint allegations, on 13-6-2003, the Plaintiff sent to the Defendant No.1 a finalised approved draft of the agreement to be signed and executed between the parties. By notice dated 11-8-2003, the Defendant No.1 terminated the agreement and requested the Plaintiff to return 177 companies to it. According to the Plaintiff, however, the termination notice was not acted upon by the Defendant No.1, in asmuch as, on 9-9-2003 a further amount of Rs.10 crores was received by the Defendant No.1 from the Plaintiff unconditionally. Thus, according to the Plaintiff, by September, 2003 an amount of Rs.25 crores was paid by the Plaintiff to the Defendant No.1. The

Plaintiff forwarded in January, 2004 a final draft of the agreement together with declaration. According to the Plaintiff, as the Plaintiff did not receive any comments from the Defendant No.1, the Plaintiff got the agreement engrossed and stamped and also paid stamp-duty. This fact was intimated to the Defendant No.1. According to the Plaintiff, a meeting was held between the Plaintiff and the Defendant No.1 in the month of May, 2005. By letter dated 4-7-2005, the Defendant No.1 again terminated the agreement and asked for return of 177 companies. According to the Plaintiff, on 25-7-2005 the Defendant Nos. 5, 7 & 11 being share holders of Pahadi Goregaon Land Development Pvt.Ltd. entered into consent terms with Defendant No.4 in Civil Suit No.4925 of 2000. As a result of those consent terms, the land was to revert back to Defendants Nos.7 & 11. These consent terms were entered into and the order of the court obtained on the consent terms without issuing notice to the Plaintiff.

8. In this background in December, 2005, the Plaintiff filed this civil suit. The present notice of motion was taken out in the suit. By order dated 2nd February, 2006 the learned single Judge of this

court granted ad-interim order of injunction restraining the Defendants from alienating, encumbering or creating third party rights or parting with possession of the suit property. That order was challenged in appeal. The appeal was allowed by the Division Bench and the order granting ad-interim was set aside. The order of the Division Bench was challenged before the Supreme Court. The Supreme Court set aside the order of the Division Bench and directed that the Notice of Motion is to be disposed of at an early date without being influenced by the observations made by the Division Bench or by the Supreme Court.

9. The learned Counsel appearing for the Plaintiff submits that the MOU is essentially an agreement to transfer the immovable property. He relies in support of this submission on Clause 11 of the MOU whereby 59% share in the club house and golf course was to be transferred to the Plaintiff. The learned Counsel also relied on clause 2(a) to contend that it contempts sharing of FSI between the Plaintiff and the Defendant No.1 in the ratio of 59:41 % in respect of the land to be developed as residential area. The learned Counsel relies on the judgment of the

Division Bench of this court in the case of M/s.Chheda Housing Development Corporation v/s. Bihijan Shaikh Farid & ors. in Appeal No.1081 of 2005 decided on 15-2-2007 to contend that FSI is immovable property. He also relied on recital in clause 2(b) and 2(c). The learned Counsel submits that combined reading of Clauses 2, 9, 12 & 13 of the MOU makes it clear that rights were granted to the Plaintiff to sell the residential bungalows and the land on which they were to be constructed. It is submitted that the Defendant No.2/ Madhusudan Brijlal Vakharia was to propose mechanism for transfer of the ownership of the residential bungalows and accordingly to ensure that the Plaintiff got their 59% share in the land and the residential bungalows to be constructed, Mr.Vakharia suggested that the entire share holding of the 177 companies who are members of Defendant no.4 Co-operative Society would be transferred to the Plaintiff.

10. The learned Counsel further submits that by clause 5(b), the Plaintiff is given right of preemption called right of first refusal in respect of bungalows and land to be allotted to Defendant No.1 relying on the judgment of the Supreme Court in the

case of Shivaji v/s. Raghunath, AIR 1997 SC 1917. The learned Counsel submits that the right of preemption is the right in immovable property and therefore an agreement giving right of preemption is an agreement to transfer right in immovable property and therefore, a decree of specific performance of such an agreement can be granted by the court. The learned Counsel also relied on recitals in Clause 22 of the MOU.

11. The learned Counsel submits that the MOU has actually been acted upon by the parties. The letter dated 29-12-2001 shows that right of entry and licence to enter upon the land was granted to the Plaintiff by Defendant No.1 and the Defendant No.4. The Plaintiff paid Rs.25 crores to the Defendant No.1 under the agreement. The Plaintiff also funded the litigation that was filed in this court against the stop work notice. The Plaintiff spent an amount in excess of Rs.11 crores for carrying out work on the land. The Plaintiff also had to spent Rs.1.77 crores for acquiring share holdings in 177 companies which are members of the Defendant No.4- co.operative society as per the mechanism devised by the defendant no.2. The learned Counsel further submits that the

MOU is a composite agreement and predominant purpose of the MOU is to transfer the immovable property. It does not merely give development rights to the Plaintiff. It is submitted that there are many features of this agreement which are unusual and are not found in the usual development agreements which are mainly for the construction of a building on a plot of land. The learned Counsel further submitted that the notice dated 4-7-2005 terminating the MOU is illegal and bad in law, as no breach of the agreement was committed by the Plaintiff. The learned Counsel relied on the judgment of the Division Bench in the case of M/s.Chheda Housing referred to above. He also relied on the judgment of the Division Bench of this court in the case of M/s.Ghori & Khatri Builders v/s. Iqbal Hussein Usman Fakir Mohamed Mansoori & ors, in Appeal No.218 of 1991 decided on 9-3-1993. He also relied on the judgment of the Division Bench dated 25-9-1991 in the case of Mrs.Pallavi R. Karane v/s. Dadhawala Builders & ors. in Appeal No.784 of 1991. The learned Counsel also placed reliance on the judgment of the learned single Judge in the case of Mahendra J. Vora v/s. Aditya Enterprises & ors. in Notice of Motion No.1568 of 2004 in Suit No.1455 of 2004 decided on 7/8th December, 2006. The learned

Counsel submits that the MOU is a concluded contract. He submitted that the vital terms binding between the parties are all incorporated in the agreement. According to Clause 26 of thew MOU, only legal terms were to be settled and agreed upon. The learned Counsel relied on a letter dated 7-6-2003 from the Defendants to contend that even according to the Defendants, after the MOU final agreement was reached into between the parties. The learned Counsel relied on the judgment of the Privy Council in the case of Harichand Mancharam v/s. Govind Luxman Gokhale, 1923 Privy Council 47, a judgment in the case of Shankarlal Narayandas Mundade v/s. The New MO Fussil Co. Ltd. , AIR (33) 1946 Privy Council, 97, as also the judgment of the Supreme Court in the case of Kollipara Sriramulu v/s. T. Aswatha Narayana, AIR 1968 SC 1028, in support of his contention that there is a concluded contract between the parties. The learned Counsel further submitted that the consent decree entered into between the Defendants Nos. 7 & 11 on one hand and Defendant No.4 on the other in Suit No.4925 of 2000 is a collusive decree. It is submitted that the Defendant No.4 is controlled by Defendants Nos. 2 & 3. Its name appears in Cause 25 of the MOU. It is submitted that the Defendant No.2

had filed an affidavit dated 19-7-2005 in that civil suit as Directors of Defendants Nos. 7 & 11 who were Plaintiffs in that suit stating therein that no third party rights have been created in the suit land, when Defendant No.2 had signed the MOU. It was also contended that the civil suit was only for money decree.

12. On behalf of the Defendants Nos. 1 to 3, the learned Counsel submits that the MOU is not a concluded contract. He submits that under the MOU itself it is stated that the MOU incorporates only broad points agreed to between the parties that the final agreement is to be executed in future. He submitted that then the mode as to how the title is to be transferred to the purchaser of the bungalows was yet to be decided and it was to be decided by Defendant No.1. He submitted that the parties are agreed not to be bound by the MOU unless further agreement is signed. It is submitted that the Plaintiff is seeking a decree directing the Defendants to sign the formal document. According to the learned Counsel, therefore, this agreement is merely an agreement to entered into another agreement. The Learned Counsel next submits that at

the relevant time, Chapter XX-C of the Income Tax Act was in force and no application was made under Chapter XX-C for obtaining permission of the authority. According to the learned Counsel, therefore, the agreement is illegal. The learned Counsel submits that there is clear variation in the terms contained in the MOU and the terms which are contained in the final draft which is alleged to have approved by the Defendant No.1. The learned Counsel further submits that the MOU is merely a development agreement and therefore a decree of specific performance of the development agreement is never made by this court. It was contended that the Plaintiff is also not entitled to any relief which is in the discretion of the court, because they have falsely contended that they are in possession of the land when the agreement itself did not contemplate they being placed in possession of the land. It was further submitted that the MOU states that it is an agreement for joint venture. It is submitted that core of joint venture is trust and faith between the parties. It is submitted that in view of the fraud, dispute, misrepresentation etc. made by the Plaintiff, the parties have lost trust and faith in each other, and therefore, under Section 16(b) a

decree of specific performance cannot be granted. In support of the submission that the decree of specific performance cannot be granted by a development agreement, the learned Counsel relied on the judgment of the learned single Judge of this court dated 27th December, 2005 in Notice of Motion No.3280 of 2004 in Suit No.3193 of 2004, which has been upheld by the Appeal Court by judgment dated 9th January, 2006 in Appeal No.115 of 2005. The learned Counsel relied on Clause 23 of the MOU to contend that that Clause contemplates that if a final agreement including power of attorney is not executed within the period of six months from the date of MOU, then the agreement would come to an end. The learned counsel also submits that the Plaintiff has failed to establish that 177 companies in which it has acquired share holdings are members of the Defendant No.4-Co.operative society. The learned Counsel submits that the decree passed in civil suit between the Defendants Nos. 7 & 11 and Defendant No.4 cannot be termed as a collusive decree.

13. The learned Counsel appearing for the Defendant No.4 submitted that nothing is brought on record by the Plaintiff to show as to how the Defendant No.4 is

liable to perform the terms of the MOU. It is submitted that the Plaintiff has not placed any reliance on any resolution passed by the Defendant No.4-co.operative society to accept the MOU. It is submitted that the final draft of the agreement was never sent to Defendant No.4. There was no correspondence entered into between the Plaintiff and the Defendant No.4 in relation to the agreement. It is contended that the Defendant No.4 was not a party to the agreement to transfer its ownership rights in any immovable property. The learned Counsel also submits that the Plaintiff also failed to prove that the 177 companies are members of the Defendant No.4. It is submitted that the Defendant No.4 was to admit members as per the development agreement with the Defendant No.1 after construction is made on the land. As construction is not made on the land, there is no question of admitting any members.

14. The learned Counsel appearing for the Plaintiff in rejoinder submitted that there is no radical change brought about in the MOU by the final draft of the agreement. There are some modifications made in the final draft of the agreement because of the development taking place after signing of the MOU,

namely the mechanism devised by Mr.Vakharia for transfer of 59% of the property in favour of the Plaintiff. In so far as the submission that the agreement is contrary to Chapter XX-C of the Income-tax Act is concerned, the learned Counsel submits that there is no provisions in Chapter XX-C which invalidates any written agreement to sell any property. The provisions of Chapter XX-C of the Income-tax Act prevent registration of actual transfer of property unless the agreement entered into between the parties is submitted to the authorities before execution of the transfer deed. It was submitted that in any case now Chapter XX-C is not in force. The learned Counsel submits that so far as the submission made on behalf of the Defendant No.4 that it is not signatory to the MOU is concerned, in view of the recital in Clause 25 of the MOU and the letter dated 29-1-2001, the Defendant now cannot claim that it is not a party to the MOU. It is submitted that though the Defendant No.4 claims that the 177 companies are not its members, it never produced its membership register. It is also contended that the Plaintiff has produced the balance-sheet of the company, which shows that it has invested in the share capital of the Defendant No.4.

15. A careful reading of the MOU shows that the MOU apart from allowing the Plaintiff to develop the entire land and erect some structures also provides for transfer of immovable property and rights in the immovable property in favour of the plaintiff. Under Clause 11 of the MOU, the Plaintiff is granted 59% share in the proprietary rights of the club house and the golf course. The golf course is nothing but the land. Thus the right in the land, particularly the land under the golf course was agreed to be transferred in favour of the Plaintiff. There is no question of there being any construction on the land under the golf course. Therefore part of the MOU is an agreement to transfer the land. Perusal of Clause 11 further shows that apart from transferring 59% proprietary rights in golf course land to the Plaintiff, a club house constructed on the land as also the residential bungalows together with the land on which they are constructed and the appurtenant land were to be transferred to the extent of 59% in favour of the Plaintiff. Clause 2(a) of the MOU shows that the FSI available was to be shared in the ratio of 59: 41 between the Plaintiff and the Defendant No.1. The Division Bench of this court in

its Judgment in the case of M/s.Chheda Housing referred to above in paragraph 15 has observed thus:

> 15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the Appellants in so far as the additional F.S.I. is concerned, are not entitled for an injunction to that extent. An immoveable property under the General Clauses Act, 1897 under Section 3(26) has been defined as under:-
>
> (26) "immoveable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."
>
> If, therefore, any benefit arises out of the land, then it is immoveable property. Considering Section 10 of the Specific Relief Act, such a benefit can be specifically enforced unless the respondents establish that compensation in money would be an adequate relief.

Can FSI/TDR be said to be a benefit arising from the land. Before answering that issue we may refer to some judgments for that purpose. In Sikandar & ors. vs. Bahadur & Ors. XXVII Indian Law Reporter, 462, a Division Bench of the Allahabad High Court held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of Section 3 of the Indian Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument. A Division Bench of the Oudh High Court in Ram Jiawan and Anr. Vs. Hanuman Prasad and Ors. AIR 1940 Oudh 409 also held, that bazar dues, constitute a benefit arising out of the land and therefore a lease of bazar dues is a lease of immoveable property. A similar view has been taken by another Division Bench of the Allahabad High Court in Smt.Dropadi Devi vs. Ram Das and Ors. AIR 1974 Allahabad 473 on a consideration of Section 3(26) of General Clauses Act. From these judgments what appears is that benefit arising from the land is immoveable property. FSI/TDR being a

> benefit arising from the land, consequently must be held to be immoveable property and an Agreement for use of TDR consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief."

Thus, the Division Bench has held that FSI, being a benefit arising from the land, is immoveable property. Thus, Clause 2(a) of the MOU is an agreement for transfer of immoveable property. Similar provision is contained in Clause 2(b) in relation to Tourism Development Zone FSI and Clause 2(c) contains the provision regarding any extra benefits arising out of the land. A combined reading of clauses 2, 9, 12 and 13 make it clear that rights were granted to the Plaintiff to sell the residential bungalows and the land on which they were to be constructed. Such residential bungalows were to be constructed on the plots to be allotted to the members of the Defendant No.4. There were 301 members of the Defendant No.4 of which 289 were companies. The Defendant No.2 Mr.Madhu Vakharia was to propose the mechanism for transfer of the ownership of the residential bungalows. Accordingly,

to ensure that the Plaintiff got their 59% share in the land and residential bungalows to be constructed, the Defendants transferred to the Plaintiff 177 member companies. The Plaintiff was thus entitled to either to sell the residential bungalows and land underneath or to transfer the companies to a third party purchaser.

16. Clause 5(b) of the MOU reads as under:-

> 5(b) In the event Jeejeebhoy deciding not to avail of their share of 41% of TDZ in accordance with Clause 2(b) as aforesaid in joint development with Sahara or Jeejeebhoy deciding to dispose of their share mentioned in 2(b), Sahara would have option of first refusal at the price obtainable by Jeejeebhoy from their Purchasers and in the event there are no Purchasers, purchase price will be determined for this option by valuers jointly appointed by the parties. The said sum of Rs.25 crores referred to in Clause 4 above shall first stand adjusted out of the payment and balance payment will be made to Jeejeebhoy. However, Sahara will have option

to refuse to buy.

Perusal of above Clause 5(b) shows that right of preemption called right to first refusal in respect of bungalows and land to be allotted to Defendant No.1 is granted in favour of the Plaintiff. A preemption right is enforceable in court of law. The Supreme Court in its judgment in the case of Shivaji Raghunath (supra) has held that when an agreement creates preemptive right it is enforceable as and when an attempt is made by the owner to alienate the land to third party. Thus, an agreement creating a preemptive right is enforceable. Clause 5(b) clearly creates a right of preemption in favour of the Plaintiff.

17. Clause 22 of the MOU reads as under:-

> 22. SAHARA will be entitled to borrow money by raising loan against the project for project development as envisaged under these presents and will use such monies only for the development of the projects. SAHARA alone will be liable and responsible for discharging such borrowings, if any, and Jeejeebhoy's

interest will not be jeopardized in any manner.

Perusal of above clause 22 shows that the Plaintiff was entitled to borrow money against the project and for the purpose of project. The Plaintiff was thus, given right to mortgage his rights under the MOU for getting loan. This suggests that rights in immoveable property were created in favour of the Plaintiff and it is only because of that that he could create charge on those rights to get finance from third party. Perusal of the MOU shows that it cannot be termed as a pure and simple agreement for development of land. In my opinion, the real nature of the agreement is that it is a composite agreement. It has some features of development agreement. It has some features of agreement to transfer the land. Some of the features to which I have made referred above show that it is an agreement to transfer the land. The most significant aspect, in my opinion, is recital for transfer of 59% of rights in golf course, which is nothing but land. Considering that only a small portion of the land can be used for construction, a substantial part of the land will be covered by golf course. The agreement contemplates

transfer of 59% of ownership in the golf course to the Plaintiff. Therefore, substantial part of the land which is the subject matter of the MOU is to be transferred under the MOU to the Plaintiff. Therefore, in my opinion predominant features of the MOU is that it is an agreement to transfer the land and therefore, in my opinion, the statutory presumption raised in Section 10 of the Specific Relief Act would be available in relation to such a MOU. In my opinion, in view of this peculiar feature of the MOU, it cannot be termed as merely a development agreement and therefore, it is not necessary for me to consider the judgment relied on both the parties in relation to enforcibilty of development agreement. I find that substantial part of the MOU is an agreement for transfer of immovable property and therefore the statutory presumption raised by sub-section 2 of Section 10 of Specific Relief Act that breach of contract to transfer the immovable property cannot be adequately relieved by compensation in terms of money is available in relation to the MOU.

18. On behalf of the Defendants Nos.1, 2 & 3, it was submitted relying on Clause 26 of the MOU that

the MOU is not a concluded contract. Clause 26 reads as under:-

> 26. The above terms are strictly commercial terms, the legal terms will be included in the final agreement. It is however, made clear that the title in respect of the said property will be verified and title certificate will be issued by M/s.Kantilal Underkat Advocate & Solicitors for Jeejeebhoy.

Reading of the terms contained in the MOU shows that the vital terms constituting the binding contract between the parties are incorporated in the MOU. The rights and interest of both the parties, the land which is the subject matter of the contract, the amounts to be paid and spent, the period within which the contract is to be performed are all provided for in the MOU. Merely, because Clause 26 recites that legal terms will be included in the final agreement does not mean that the parties do not intend to be bound by the MOU. In my opinion, the whole debate on the question whether the MOU is a concluded contract between the parties or not, becomes meaningless if one peruses the letter dated 7-6-2003 written by the

first Defendant to the Plaintiff. Paragraph 1 of that letter is relevant. It reads as under:-

> 1. In the above matter inspite of repeated requests from our clients M/s.B.Jeejeebhoy Vakharia and Associates your clients have not carried out the terms of above Memorandum of Understanding (MOU). They have even not made full payment though the same was payable by the end of December, 2001. The regular agreement and other papers have been finalised since long. Your clients have informed our clients that the agreement is adjudicated for the purpose of stamp duty. However, it appears that the same is not stamped and therefore not executed. (emphasis supplied)

Alongwith the plaint the Plaintiff has produced a letter dated 11-2-2003, copy of which is at Exh.E to the plaint, written by the Plaintiff to the Defendant No.1. In that letter the Plaintiff states that the agreement has been finalised and is ready for execution. The Plaintiff in the notice dated 4th August, 2005 has stated that the draft agreement and draft declaration were approved by the Defendant No.1

in December, 2002. It is in this back ground that in the letter dated 7-6-2003 the Defendant No.1 states that the regular agreement and other papers have already been finalised between the parties. In my opinion, therefore, the Defendants Nos.1, 2 & 3 are not entitled to say that there is no final agreement between the parties. The letter dated 7-6-2003 clearly shows that the legal terms which are referred to in Clause 26 were finalised between the parties and the parties had reached final contract. In the letter quoted above, the Defendant No.1 clearly states that the final agreement is not executed only because the Plaintiff has not paid the stamp duty on that agreement. In my opinion, in view of this clear statement made in the letter, without any proper explanation being given, the Defendants Nos. 1, 2 & 3 cannot contend that there is no concluded contract between the parties.

19. It is further to be seen here that apart from there being a concluded contract between the parties, the agreement has also been acted upon by the parties. The Plaintiff has paid Rs.25 crores to the first Defendant. The Plaintiff has claimed that it has spent an amount in excess of Rs.11 crores in

carrying out the development work on the land. The Plaintiff has demonstrated that pursuant to the mechanism devised by Defendant No.3 Vakharia, the Plaintiff was to acquire share holdings in 177 companies which are members of the Defendant No.4 society, and for that purpose, steps were taken by the Plaintiff to acquire the share holdings in 177 companies and the plaintiff also spent an amount of Rs.1.77 crores for that purpose. This fact gets established from the letter of the Defendant No.4 itself. In the letter dated 11th August, 2003 whereby the Defendants terminated the MOU, the Defendant No.1 calls upon the Plaintiff to return the companies handed over to the Plaintiff and which were promised to be returned by the Plaintiff by letter dated 11-2-2003. Thus, it is clear that there is a concluded contract between the parties, which has been acted upon. Substantial part of that agreement is for transfer of immovable property and therefore, it prima facie appears that the Plaintiff has made out a prima facie case that the Plaintiff would be entitled to a decree of specific performance sought by it.

20. It was contended on behalf of the Defendants

that the MOU is void, because of non-compliance of the provisions of Chapter XX-C of the Income-tax Act. Perusal of the provisions of Chapter XX-C of the Income-tax Act shows that it does not prevent a party from entering into a written agreement for transfer of immovable property. The only requirement is that before executing the conveyance the written agreement which is entered into between the parties is to be submitted to the authorities because Chapter XX-C gives preemptive right of purchase to the Government of India. In the present case as a final written agreement was never actually signed by the parties, there was no question that agreement being submitted to the authorities under Chapter XX-C of the Income-tax Act. In my opinion, therefore, the provisions of Chapter XX-C cannot operate to make the MOU void. In my opinion, reliance was rightly placed by the Plaintiff on a judgment of the learned single Judge of the Delhi High Court in the case of Shri Rajesh Aggarwal v/s. Shri Balbir singh and anr., AIR 1994 Delhi 345. In my opinion, following observations from that judgment found in paragraph 14, are relevant:

> 14. The basic fallacy in the arguments of

Mr.Sahai is that the transferor, who is to transfer the property pursuant to an agreement to sell which is otherwise valid in law cannot seek a declaration from the Court for specific performance of that agreement complete misreading of relevant provisions of the Income-tax Act. What is forbidden under Section 269UC of the Income-tax Act and rules framed thereunder is No Objection Certificate from appropriate authority in relation to sale if there is a non-compliance of the provisions of Income-tax Act and rules framed thereunder followed by option given to the Government to buy the property on the valuation recorded in the statement and followed by penalty. No transfer can take place in the absence of non-compliance of the aforesaid provisions. But to argue that Agreement to sell is illegal, cannot be the impact of the language of Section 269UC and rules framed thereunder. Even otherwise the suit for specific performance of Agreement. In a given case Court is empowered to give suitable directions regarding obtaining of permission from the appropriate authority. But can a party use

the forum of Court at the threshold to wriggle out of its contract. The answer is in negative.

21. On behalf of the Defendants, it was contended that perusal of Clause 5(a) of the agreement at Exh.R in relation to which the Plaintiff is claiming a decree of specific performance shows that there is variance in the terms contained in Clause 5(a) and the terms in the MOU. Therefore, the Plaintiff would not be able to claim a specific performance in relation to the agreement at Exh.R. Perusal of clause 5(a) shows that it does incorporate a slight modification in the terms contained in the MOU, but that modification has become necessary because of the method devised by Defendant No.3 Mr.Madhu Vakharia for transfer of 59% rights of the Plaintiff. The method suggested by Mr.Vakharia was that the share holdings of 177 companies which are members of the Defendant No.4 would be taken over by the Plaintiff, and the modification that is made in clause 5(a) is because of that.

22. After hearing the learned Counsel appearing for both sides in detail on this, I do not find that the

variance which is found between the terms contained in the MOU and clause 5(a) was not agreed upon between the parties. In my opinion, the learned Counsel appearing for the Plaintiff was right in pointing out that even the Defendants did not consider that there is any variance, because along with their affidavit dated 17-7-2006 the Defendants have enclosed a chart showing points of variance between the MOU and final agreement at exhibit R but that chart does not contain clause 5(a). I do not find any substance in the objection raised by the Defendant Nos. 1, 2 & 3. There were two submissions made on behalf of the Defendant No.4, first submission was that it is not a party to the MOU. Therefore, no decree can be made against it. But what is significant is that Clause 25 of the MOU contains name of Defendant No.4 and declares that it is part of Jeejeebhoy, and it is nowhere contended by Defendant No.4 that Defendant No.3 who signed the agreement on behalf of the Defendant No.1 and Defendant No.2 who signed the agreement as a witness had no authority to declare by Clause 25 that Defendant No.4 is a party to the agreement. What is more significant is that though the Plaintiff has annexed a copy of the letter dated 29-12-2001 signed

by the Defendant No.4, which says that pursuant to the MOU the licence to enter the property is created in favour of the Plaintiff, the Defendant No.4 has chosen to remain entirely silent about it. It is nowhere explained as to why if it was not party to the MOU, it signed the letter at Exh.C. Defendant No.4 has also not explained anywhere, if it was not a party to the MOU why it never objected to the Plaintiff carrying on development work. At the hearing, I asked the learned Counsel for the Defendant No.4 to point out to me a statement made by Defendant No.4 that the Defendant No.3 who has signed the MOU had no authority to represent it. The learned Counsel was not able to point out such a statement. Therefore, I asked him to take instructions whether he is in position to make a statement to that effect at bar. The learned Counsel took instructions and expressed his inability to make any such statement. It is thus clear that Defendant No.4 is very much a party to the MOU and the stand taken by it that it is not a party to the MOU is false. It was also contended on behalf of the Defendant No.4 that the averments of the Plaintiff that 177 companies names of which are disclosed by the Plaintiff in the plaint are members of the

Defendant No.4 is wrong. Defendant No.4 is a Co.operative Society and therefore is under a statutory obligation to maintain a register which includes the names of its members. Therefore, when the learned Counsel appearing for the Defendant No.4 tried to argue that these 177 companies are not members of the Defendant No.4, I asked him to produce the membership register. I also told him that because a Co.operative Society is under an obligation to maintain a membership register and that membership register is maintained in usual course of business of Co.operative society, it will have presumptive value. The learned Counsel, however, expressed his inability to produce the membership register. I have already observed above that it appears from the material available on record that the Defendant No.4 is controlled by Defendants Nos. 2 & 3. By the letter by which the MOU was terminated, the Plaintiff has been called upon to return 177 companies which are members of the Defendant No.4. Had the 177 companies not been the members of Defendant No.4, there was no question of Defendant No.3 asking the Plaintiff to take over share holdings of those companies for the purpose of transferring 59% rights of the Plaintiff. The Plaintiff has produced on record the document

which shows that 177 companies have invested in the shares of Defendant No.4. There was some debate before me as to whether the consent decree passed in Suit No.4925 of 2000 is collusive or not. Perusal of the record of that civil suit shows that two things clearly stand out, (i) in that civil suit there was no decree sought for cancellation of transfer of the land to Defendant No.4, still the consent terms provided for transfer of immovable property. (ii) secondly, an affidavit has been filed by Defendant No.2 in that civil suit clearly stating that they are no third party right created in the property, though the second Defendant has signed the MOU as a witness. It is no doubt true that in view of the provisions of Civil Procedure Code, consent terms signed between the parties can not travel beyond the scope of the suit. But if the consent terms contemplate transfer of immovable property, either there will have to be conveyance executed and registered or the decree will have to be registered in order to bring about transfer of title from one party to the other. As a result of Conveyance executed by the Company which was owner of the land, the title to the land passed to the defendant no.4. Now the consent terms contemplate that the title to the land shall be

transferred from defendant no.4 to defendant no.7 and 11 who were shareholders of the company which was the owner of the land. In these circumstances, title of the land can pass from the defendant no.4 to defendant nos.7 and 11 only on registration of transfer deed or registration of the decree under the Registration Act. It is nobody's case that either there is a conveyance executed transferring the title of the land from Defendant No.4 to Defendants Nos.7 & 11 or that the consent decree has been registered. Therefore, the consent decree will not have the effect of divesting the Defendant No.4 of the title of the land. In any case, even if it is assumed that the consent terms has that effect, then also the title to the land will be transferred to Defendants Nos.7 & 11. Defendants Nos. 7 & 11 are also parties to the MOU because Clause 25 of the MOU also includes their names. In my opinion, therefore, looking at the matter from any point of view, the consent decree is of no consequence, for the purpose of deciding this notice of motion.

23. There was some debate before me as to whether the claim made by the Plaintiff that they were placed in possession of the land disentitles the Plaintiff

to any relief which is in the discretion of the court. It appears that the MOU contemplated grant of licence in favour of the Plaintiff to enter upon the land to carry out the development work. That licence was in fact granted by the Defendants Nos.1 & 4 in favour of the Plaintiff and the Plaintiff was actually carrying on development work on the land. The Plaintiff understood this to mean that they are in possession of the land. But the fact remains that at some point of time the Plaintiff was on the land for the purpose of carrying on development work. In my opinion, therefore, though the Plaintiff was wrong in claiming that they are in possession, that by itself will not disentitle the Plaintiff to the interim reliefs, to which they are otherwise entitled.

24. So far as the aspect of balance of convenience is concerned, in my opinion, that is also in favour of the Plaintiff. The land is in No Development Zone. Without permission from the authorities for carrying out the development of the land, no development can be carried on. It is common ground that presently there is no permission in force granted by the competent authorities for carrying out

the development work on the land. It appears from the record that the Plaintiff has made substantial investment for development of the land, for acquiring the above referred 177 companies and has also paid Rs.25 crores to the Defendants. Therefore, if the Defendants are permitted to create third party rights in the property during the pendency of the suit, it will adversely affect the interest of the Plaintiff.

25. Taking all these aspects into consideration, in my opinion, the Plaintiff is entitled to have the ad-interim order made in its favour confirmed. Ad-interim order dated 2-2-2006 is, therefore, confirmed. Motion disposed of.

...